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No. 82-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ESCAMBIA RIVER ELECTRIC COOPERATIVE, INC.,
Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION and
GULF POWER COMPANY,
Appellees.

On Appeal From the Supreme Court of Florida

MOTION TO DISMISS

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On Appeal From the Supreme Court of Florida

MOTION TO DISMISS

MAY IT PLEASE THE COURT:

Appellee, Gulf Power Company,[1] moves to dismiss on the following grounds:

(1) This appeal is not within the appellate jurisdiction of this Court, because it was not taken in

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[1] Gulf Power Company is a wholly-owned subsidiary of The Southern Company, in accordance with the provisions of the Public Utility Holding Company Act of 1935. The other wholly-owned operating subsidiaries of The Southern Company are: Alabama Power Company, Georgia Power Company, and Mississippi Power Company. This statement is made pursuant to Rule 28.1, Rules of the Supreme Court of the United States.

conformity with 28 USC § 1257(2) [Rule 16(1)(a)];

(2) This appeal "does not present a substantial federal question" [Rule 16(1)(b)];

(3) Any "federal question sought to be reviewed was not timely or properly raised or expressly passed on" in the state court [Rule 16(1)(b)]; and

(4) The judgment that is the subject of this appeal "rests on an adequate non-federal basis." [Rule 16(1)(b)].

OBJECT OF MOTION

Appellee's motion to dismiss is intended to show, first, that the appellant did not present its challenges to the Florida Public Service Commission's order in the proper form for invoking this Court's appellate jurisdiction. Nowhere in the appellant's briefs to the Supreme Court of Florida, or in its Jurisdictional Statement, does the appellant allege that the "statute of any state" is "repugnant to the Constitution, treaties or laws of the United States." If, pursuant to 28 USC § 2103, the Court treats this appeal as a petition for certiorari, this motion is intended to show, second, that the appellant has not raised a substantial federal question. The Florida Public Service Commission order, that is the subject of this appeal, merely resolved a simple territorial dispute in accordance with statutory provisions that are exclusively a matter of Florida law. Third, it is the object of this motion to show that any federal question sought to be reviewed by the appellant was not timely or properly raised or expressly passed on in the state court. Finally, it will be shown that the decision below is so obviously correct, on an adequate non-federal basis, as to warrant no further review. Therefore, the appeal should be dismissed, or in the alternative, certiorari should be denied.

FACTUAL BASIS

The findings of fact of the Florida Public Service Commission, contained in Order No. 10171 [Appendix B to appellant's Jurisdictional Statement], are not now disputed. Gulf Power Company received requests for electric service from two industrial customers, Exxon Company, U.S.A., and Air Products & Chemicals, Inc., at the Blackjack Creek Miscible Gas Displacement Project.[2] Thereupon, Escambia River Electric Cooperative, Inc. filed a petition with the Florida Public Service Commission, seeking to have the Commission prohibit Gulf from serving these two industrial customers. Both Gulf Power and Escambia River were, at that time, serving other customers in the same geographic area. Therefore, neither had an exclusive franchise to serve the area[3] and the Commission found that, factually, neither was in a superior position to serve these two customers. As is evident from a review of everything in the record, appellant has not alleged or contended that a Florida statute, as applied, is repugnant to a federal statute, treaty, or constitutional provision. Nor is there any evidence of a substantial federal question presented. Instead, it is abundantly clear that the decision of the Florida Public Service Commission was based exclusively upon the Commission's statutory authority to resolve territorial disputes in accordance with Florida law and the particular facts involved in this case. These facts clearly support this motion.

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[2] Upon receiving a request for service, an electric utility is under a statutory duty to provide service to the customer. § 366.03, *Fla. Stat.* (1981).

[3] In the appellant's Jurisdictional Statement, the first question presented improperly attempts to define the service territory as "a rural area historically served by a rural electric cooperation," which is contrary to the undisputed evidence that both Gulf and Escambia River had, historically, served this area.

ARGUMENT

(1) *This appeal was not taken in conformity with 28 USC § 1257(2).* This appeal is not within the appellate jurisdiction of this Court because it was not taken in conformity with 28 USC § 1257(2), which provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The appellant expressly relies on this statute as the basis for this appeal.[4] [See appellant's Jurisdictional Statement, page 1] The decision of the Supreme Court of Florida, which is the subject of this appeal, only mentions two statutes: Section 366.04(2)(e)[5] and Section 425.04(4),[6] *Florida Statutes* (1981). It is readily ap-

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[4] Appellant additionally relies on *Atchison, Topeka, & Santa Fe Ry. Co. v. Public Utilities Commission of the State of California*, 346 US 346 (1953), to sustain jurisdiction. The *Atchison* case is clearly distinguishable from this case because: (1) in *Atchison*, "the appellants *presented squarely* to the Supreme Court of California their contention that in the allocation of costs, these orders take their property without due process of law and are so arbitrary and burdensome as to constitute an interference with interstate commerce, in violation of the Constitution of the United States." 346 US at 348 (emphasis supplied); and (2) a substantial federal question was presented.

[5] Quoted in appellant's Jurisdictional Statement at page 2.

[6] This statute is quoted only in part in the appellant's Jurisdictional Statement at page 2, and reads in its entirety as:

> [a cooperative shall have power:]
>
> (4) To generate, manufacture, purchase, acquire, accumulate and transmit electric energy, and to distribute, sell, supply, and dispose of electric energy in rural areas to its members, to governmental agencies and political subdivisions, and to

parent, however, that the appellant has not alleged or contended that either of these statutes, or any Florida statute, is repugnant to the Constitution, treaties, or laws of the United States.

It is well recognized that the burden is upon the appellant to establish, for appeal purposes, a proper jurisdictional basis. An appeal from a state court will not lie if the state statute was not "drawn in question" on the ground of being repugnant to the Constitution, treaties, or laws of the United States. *Rohr Aircraft Corp. v. San Diego County*, 362 US 628 (1960); *Wilson v. Cook*, 327 US 474, 482 (1946); *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 US 182, 185 (1945); *Jett Bros. Distilling Co. v. City of Carrollton*, 252 US 1 (1919). Escambia River has not, therefore, met the statutory jurisdictional requirement.

In its briefs to the Supreme Court of Florida and in its Jurisdictional Statement, appellant does not allege that any Florida statute is unconstitutional or repugnant to any treaty or law of the United States. Instead, in appellant's initial brief to the Supreme Court of Florida, its Point II stated that: "The announced policy basis upon which PSC rendered its decision amounts to an arbitrary and oppressive exercise of governmental power," [7] which violated the appellant's federally pro-

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other persons not in excess of 10 percent of the number of its members; to process, treat, sell, and dispose of water and water rights; to purchase, construct, own and operate water systems; to own and operate sanitary sewer systems; and to supply water and sanitary sewer services. However, no cooperative shall distribute or sell any electricity, or electric energy to any person residing within any town, city or area which person is receiving adequate central station service or who at the time of commencing such service, or offer to serve, by a cooperative, is receiving adequate central station service from any utility agency, privately or municipally owned individual partnership or corporation;

[7] Appellant's initial brief before the Supreme Court of Florida, at page 13.

tected rights. Again, appellant stated that ". . . the PSC has discriminated against Escambia because Escambia is a cooperative." [8] Appellant further concluded that: ". . . the actions of the PSC amount to the taking of such property without due process of law, and deny Escambia its rights to equal protection of the law," [9] but failed to advance any specifics. In its reply brief, the appellant merely asserted, without further argument, that: "The Commission action is a denial of state and federal constitutional standards." [10]

Similarly, the appellant has failed to challenge any statute, as applied, in its Jurisdictional Statement to this Court. Its second question presented is:

> Does such policy constitute an arbitrary and unreasonable exercise of governmental power, constituting a denial to the cooperative of due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution?

The appellant goes on, at page 8 of its Jurisdictional Statement, to state that the decision of the Supreme

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[8] Appellant's initial brief before the Florida Public Service Commission, at page 19.

[9] Appellant's initial brief before the Supreme Court of Florida, at page 21. With regard to property rights, the cooperative has no property right created by the Constitution, as appellant seems to maintain. *Cf. Board of Regents of State Colleges v. Roth*, 408 US 564, 577 (1972). Nor does the cooperative have any property right in any *potential* customer. *Rural Electrification Administration v. Central Louisiana Electric Co.*, 354 F.2d 859 (5th Cir.), *cert. den.*, 385 US 815, *reh'g den.*, 385 US 904 (1969). With regard to equal protection, the Florida Legislature has placed certain reasonable limitations upon what Florida electric cooperatives can and cannot do. There is no denial of equal protection in such action. *Allied Stores of Ohio, Inc. v. Bowers*, 358 US 522, 528 (1959). None of these arguments were attempted to be advanced before the Supreme Court of Florida by the appellant, however.

[10] Appellant's reply brief before the Supreme Court of Florida, at page 9.

Court of Florida "has deprived Escambia of its property rights without due process of law and has denied Escambia the equal protection of the law." The only reference to a state statute is that:

> The grounds enunciated by the Florida Public Service Commission, and affirmed by the Supreme Court of Florida, bear no rational relationship to the legitimate interests of the State of Florida in maintaining a power supply system within the State which will sufficiently provide for the needs of its citizens without unnecessary duplication of facilities. § 366.04(3), *Fla. Stat.*, 1981.[11]

Nowhere in the Jurisdictional Statement, however, is there a challenge to any specific state statute as is required by Section 1257(2) in order to invoke this Court's appellate jurisdiction.

It is not enough for appellant to merely argue that the effect of an order or policy was a denial of the appellant's federal rights. Thus, having failed to present its challenge in the proper form, the appeal should clearly be dismissed.

(2) *This appeal does not present a substantial federal question.* Escambia River Electric Cooperative, Inc. is a Florida cooperative created under the specific authority of Florida state law.[12] Although it is true that Escambia River Electric Cooperative is eligible to receive reduced-rate loans under federal law, as are all other rural electric cooperatives, such loans are not involved in this case. There is no other federal relationship. It is most important to remember that this cooperative is a creation of Florida law, subject to the powers, authority, and limitations specified under Florida law. Section 425.04,

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[11] Jurisdictional Statement, at page 8.

[12] Chapter 425, *Fla.Stat.* (1981), "Rural Electric Cooperatives." This chapter is specifically known as the "Rural Electric Cooperative Law." § 425.01, *Fla.Stat.* (1981).

Florida Statutes (1981), sets forth the powers of rural electric cooperatives in general, and is a source of the alleged rights with respect to which the appellant claims it has been denied due process and equal protection. This same section, however, specifically limits the power of Florida rural electric cooperatives, such as Escambia River, from distributing electricity to certain classes of customers. It was the specific language and the underlying policies of Section 425.04(4), *Florida Statutes* (1981), that the Florida Public Service Commission and the Supreme Court of Florida applied in determining that, all other things being equal, Florida law did not intend for Florida rural electric cooperatives to displace service otherwise available to large industrial customers from investor-owned electric utilities serving the same area. The decisions below involved the construction and application of *Florida Statutes*, as applied to a Florida cooperative and involving particular factual circumstances in Florida. These were, necessarily, purely issues of state law.

Furthermore, the Florida Public Service Commission has the authority, under Section 366.04(2)(e), *Florida Statutes* (1981):

> (e) To resolve any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the Commission may consider, *but not be limited to consideration of*, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably forseeable future requirements of the area for other utility services. (Emphasis Added)

Under the plain language of the statute, therefore, the Florida Public Service Commission is entitled and authorized to consider other factors in resolving territorial

disputes. These other permissible topics of inquiry would include state public policy and other relevant Florida statutory provisions, such as Section 425.04(4). Whether these are, in fact, permissible topics of inquiry in resolving a territorial dispute is entirely a question of state law.

The Florida Public Service Commission's authority to "resolve any territorial dispute" [13] is intended to, *inter alia*, avoid "uneconomic duplication of generation, transmission, and distribution of faciltes." [14] The appellant's argument, at page 4 of the Jurisdictional Statement, that the non-duplication of facilities provision of Section 366.04(3) is a limitation upon the territorial dispute jurisdiction of Section 366.04(2)(e) is, again, an issue of state law. Section 366.04(2)(e) expressly states that, in resolving territorial disputes, the Commission "may consider, *but not be limited to*," certain factors. Whether the policies of Section 425.04(4), limiting the powers of rural electric cooperatives, may be considered in resolving territorial disputes is a question of Florida law that has long been settled.[15] Thus, Escambia River's attempted argument regarding an unlawful delegation of legislative authority is a matter for the state courts to determine and decide. It clearly is not a "substantial federal question."

The Supreme Court of Florida concluded that the Florida Public Service Commission had properly exercised its statutory duty, pursuant to Section 366.04(2)(e), *Florida Statutes* (1981), in resolving the territorial dispute. The Commission's findings of fact were found to be supported

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[13] § 366.04(2)(e), *Fla.Stat.* (1981).

[14] § 366.04(3), *Fla.Stat.* (1981).

[15] *Tampa Electric Co. v. Withlacoochee River Electric Coop., Inc.*, 122 So.2d 471 (Fla. 1960), *cert. den.*, 377 US 952 (1964). *Choctawhatchee Electric Coop., Inc. v. Gulf Power Co.*, 465 So.2d 417, 420 (Fla. 1st DCA 1972).

by competent substantial evidence in the record, the appropriate standard for review of administrative orders.[16] The Supreme Court of Florida also agreed that, when "no factual or equitable distinction exists in favor of either utility, *Tampa Electric Co. v. Withlacoochee River Electric Cooperative, Inc.*, 122 So.2d 471 (Fla. 1960), [*cert. den.*, 377 US 952 (1964)] controls . . . ." [17] No federal question was involved before the Supreme Court of Florida.

It is essential to the jurisdiction of this Court under 28 USC § 1257 that a substantial federal question has been properly raised. Here, the validity of a Florida Statute was not "drawn in question," nor was a federal title, right, privilege, or immunity "specially set up or claimed." [18] Escambia River has not presented a substantial federal question, and the appeal should be dismissed.

(3) *Any federal question sought to be reviewed was not timely or properly raised or expressly passed on in the state court.*

> It has long been established that the Supreme Court is vested with no jurisdiction unless a federal question was raised and decided in the state court below.[19]

A review of the opinion of the Supreme Court of Florida [20] reveals that it is devoid of any discussion or consideration of any federal question. It certainly does not expressly pass on one. As discussed above, the decision of the Florida Court was solely one involving Florida law.

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[16] § 120.68(10), *Fla.Stat.* (1981).

[17] *Escambia River Electric Coop. v. Florida Pub. Serv. Comm'n*, 421 So.2d 1384, 1385 (Fla. 1982).

[18] 28 USC § 1257(3).

[19] R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 214, citing to *Crowell v. Randell*, 10 Pet. 368, 391; *Cardinale v. Louisiana*, 394 US 437, 438 (1969).

[20] *See* Appendix A of Jurisdictional Statement.

When the highest state court has failed to rule upon an alleged federal question, "the party invoking the Supreme Court's jurisdiction has the burden of showing that he properly raised the question . . . ." [21] and "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." *Street v. New York*, 394 US 576, 582 (1969). As Mr. Justice Harlan stated:

> The rule that in cases coming from state courts this Court may review only those issues that were presented to the state court is not discretionary but jurisdictional. *Amalgamated Food Employees v. Logan Valley Plaza*, 391 US 308, 334 (1968) (dissent).

Appellant's passing references to vague constitutional rights in one heading of its brief to the court below, without any supporting argument, were not sufficient to have raised any federal question. [*See* discussion under point 1, *supra.*] It is obvious that no federal question was sufficiently and properly raised in the state court. It is essential that the federal issues, if any, be presented first in the state court.[22] Therefore, the appeal should be dismissed.

(4) *The judgment that is the subject of this appeal rests on an adequate non-federal basis.* The Florida Public Service Commission ruled, in effect, that it would not, under the particular facts of this case, prohibit Gulf Power Company from providing the requested electric service to Exxon and Air Products. The Commission properly resolved the matter, pursuant to the authority in Section 366.04(2)(e), by applying the "plain language as well as the spirit of Section 425.04, Florida Statutes." [23] The Supreme Court of Florida agreed with the

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[21] R. Stern & E. Gressman, *supra* n.19, at page 214.

[22] *Webb. v. Webb*, 451 US 493 (1981).

[23] Order No. 10171, incorporated into the opinion of the Supreme Court of Florida at page A-2 of the Jurisdictional Statement.

Commission in its findings of fact and in the application of Florida law to those facts.

Since the decision below is founded on an exclusively non-federal basis, involving the construction of state statutes, the case cannot be the subject of either appeal or certiorari. The Florida Court's construction of the statutes must be accepted,[24] and the appeal dismissed.

CONCLUSION

Appellant has not presented its challenges to the Florida Public Service Commission's order in the proper form for invoking this Court's appellate jurisdiction. If, pursuant to 28 USC § 2103, the Court treats this appeal as improvidently taken and considers it as a petition for certiorari, the appellant has not raised a substantial federal question necessary to invoke the Court's jurisdiction under 28 USC § 1257(3). Additionally, any federal question sought to be reviewed by the appellant was not timely raised or expressly passed on in the state court, as required before this Court can assume jurisdiction. Finally, the decision below is so obviously correct, on an adequate non-federal basis, as to warrant no further review.

For all of these reasons, the appeal should be dismissed, or in the alternative, certiorari should be denied.

IT IS SO MOVED.

Respectfully submitted,

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[24] *Kingsley Int. Pictures Corp. v. Regents of N.Y.U.*, 360 US 684, 688 (1959); *Guaranty Trust Co. v. Blodgett*, 287 US 509, 513 (1933).